



**FILED**

Feb 29 2008, 9:31 am

*Kevin L. Smith*

**CLERK**  
of the supreme court,  
court of appeals and  
tax court

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,  
Appellee-Plaintiff.

February 29, 2008

**BARNES, Judge**

## **Case Summary**

James Johnston appeals his conviction for Class D felony possession of a controlled substance. We affirm.

## **Issue**

Johnston raises one issue, which we restate as whether his conviction is supported by sufficient evidence.

## **Facts**

On October 20, 2006, Officer Mark Deshaies of the Fort Wayne Police Department responded to a traffic accident in Fort Wayne. Johnston was the driver of one of the vehicles involved in this accident and Officer Deshaies conducted a search of Johnston. During this search, a sealed plastic bag with white pills was found in Johnston's front pocket. Johnston explained to Officer Deshaies that the pills were Xanax, that he took them for back pain, and that they were a friend's prescription.

The State charged Johnston with one count of Class D felony possession of a controlled substance. During trial, Johnston testified that he had a prescription for the Xanax due to anxiety. However, it was also revealed that this particular prescription was not given to Johnston until November 2, 2006, thirteen days after he was found in possession of the drug. Johnston next presented evidence of a valid prescription for alprazolam, a generic version of Xanax, that was given to him on November 14, 2000 – almost 6 years before this offense. This particular prescription specified that it was to be only refilled once.

The trial court found Johnston guilty of Class D felony possession of a controlled substance. Johnston now appeals.

### **Analysis**

Johnston argues the State had the burden of proof when disproving his defense of having a valid prescription for the possession of Xanax. Johnston's offense is defined under Indiana Code Section 35-48-4-7, which provides in part:

A person who, without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally possesses a controlled substance (pure or adulterated) classified in schedule I, II, III, or IV, except marijuana or hashish, commits possession of a controlled substance, a Class D felony.

Ind. Code § 35-48-4-7. This section under which Johnston was charged is governed by Indiana Code Section 16-42-20-6(a), which provides the following:

It is not necessary for the state to negate any exemption or exception in this chapter or in IC 35-48 in a complaint, an information, an indictment, or other pleading or in a trial hearing, or other proceeding under this chapter or under IC 35-48. The burden of proof of an exemption or exception is on the person claiming the exemption or exception.

Ind. Code § 16-42-20-6(a). Furthermore, we have held that “the existence of a valid prescription is an exception to, not an element of, the possession statute.” Burgin v. State, 431 N.E.2d 864, 866 (Ind. Ct. App. 1982) (quoting Gilbert v. State, 426 N.E.2d 1333 (Ind. Ct. App. 1981)).

Johnston contends that his defense should be equated to and similarly treated as self-defense by requiring the State to bear the burden of proof. We decline the request. It is reasonable that the legislature codified the burden for these offenses in this manner

because it is more efficient to require the defendants to establish proof of the prescription. Persons with prescriptions are better positioned than the State to obtain these records. Furthermore, there is no constitutional impediment to a statute imposing the burden of proof upon a defendant on an issue if the issue is not an element of the crime. See Burgin, 431 N.E.2d at 867; see also Price v. State, 412 N.E.2d 783, 785 (Ind. 1980) (justifying the statutory burden on the defendant to prove insanity because it was not an element of the crime). Because Johnston is the person claiming the exception to the offense, he is required meet the burden of proof for his defense. See Burgin, 431 N.E.2d at 866.

Johnston argues, alternatively, that even if he bears the burden of establishing his defense, he has presented sufficient evidence to overcome the State's charges against him. Addressing this argument requires us to review the sufficiency of the evidence presented at trial. Our standard of review for sufficiency of the evidence claims is well settled. When reviewing the sufficiency of the evidence supporting a conviction, we will not reweigh the evidence or judge the credibility of witnesses. Staton v. State, 853 N.E.2d 470, 474 (Ind. 2006). We must look to the evidence most favorable to the conviction together with all reasonable inferences to be drawn from that evidence. Id. We will affirm a conviction if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Id.

Officer Deshaies' testimony revealed conflicting evidence presented by Johnston at the scene of the accident and at trial. Johnston first told Officer Deshaies that the drugs

were a friend's prescription for Xanax and that he had taken the drug for back pain. However, at trial, Johnston said that he had a prescription for the Xanax for anxiety. Furthermore, Johnston presented evidence attempting to show a valid prescription from November 14, 2000, for alprazolam, a generic form of Xanax, which was to be refilled once. Johnston later testified that he had been taking at least three pills a day since he was prescribed this medication for the past six years. Assuming Johnston was given one refill and had taken exactly three pills a day for six years, he would have taken over 6,500 pills since the date of this refill. We agree with the trial court judge's statement: "This doesn't add up." Tr. p. 27. With the prescription from November 2000 logically ruled out, the remaining valid prescription from November 2, 2006 was Johnston's last effort. However, this was not prescribed until thirteen days after the incident. Therefore, the evidence supports a reasonable inference that Johnston's defense to possession of a controlled substance fails.

### **Conclusion**

There is sufficient evidence to support Johnston's conviction for possession of a controlled substance. We affirm.

Affirmed.

SHARPNACK, J., and VAIDIK, J., concur.